vss

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.8292 OF 2003

Sunita Ramesh Chowdhari ... Petitioner

V/s.

Mrs.Vijaya Anil Shirke & Ors. ... Respondents

Mr.S.S. Kulkarni for Petitioner
Mr.N.M. Ganguli for Respondent No.1
Mr.Mihir Desai for Respondent Nos.2 and 3
Mr.S.K. Chinchalikar, AGP, for Respondent No.4

CORAM: **SMT.NISHITA MHATRE, J.**

DATED: **OCTOBER 5, 2007**

ORAL JUDGMENT:

. The writ petition challenges the order passed by the School Tribunal by which the termination orders dated 26.10.1993 and 28.9.1995 passed against Respondent No.1 by Respondent Nos.2 and 3 have been set aside. Respondent Nos.2 and 3 were directed to reinstate Respondent No.1 in the school with backwages and all consequential benefits.

2. The case of the petitioner is that she is working with the junior college of Respondent Nos.2 and 3. She is qualified with M.A. and B.Ed. degrees. The Petitioner contends that she is teaching English in the secondary school of Respondent Nos.2 and 3. A vacancy arose in the junior college which is run by Respondent No.3 alongwith Respondent No.2 school. This Junior

college is for the Arts, Science and Commerce faculties. On superannuation of the English teacher Mrs.Rane, the post was advertised on 22.6.1990. The advertisement indicated that preference would be given to candidates from the backward classes. However, there was no stipulation in the advertisement that the post was a reserved category post.

3. The petitioner applied for the post alongwith one Mr.Thosar, who was not an employee of Respondent Nos.2 and 3. Thosar was selected as he was found suitable for the post. He was appointed to that post thereafter. He continued in the post till he resigned. An advertisement was issued by Respondent Nos.2 and 3 again for the same post in 1991 pursuant to which Respondent No.1 applied for the post. Admittedly, the petitioner did not apply for the post at that stage nor did she submit any representation that her services should be transferred to the Junior College or that she was entitled to be appointed as an assistant teacher in the junior college in preference to an outsider. It appears that when the post was advertised, Respondent Nos.2 and 3 had stipulated that preference would be given to a reserved category candidate. Since no candidate from the reserved category was available, Respondent No.1 was appointed having been found suitable for the post. However, she was appointed only for one

year. The post was advertised again after that academic year and Respondent No.1 applied once more. She was again appointed to the post having been found suitable. Respondent Nos.2 and 3 thereafter continued her in the post for that academic year and terminated her services. Aggrieved by the decision of the management, Respondent No.1 approached the School Tribunal by filing an appeal being Appeal No.178 of 1993. In the meantime, it appears that the management again appointed Respondent No.1 to the post for a subsequent period and terminated her services after completion of that period. Aggrieved by this decision, Respondent No.1 filed another appeal being Appeal No.142 of 1995. It appears that the School Tribunal granted interim relief and Respondent No.1 was continued in service thereafter without any break. Respondent Nos.2 and 3, having realised that they had wrongly appointed Respondent No.1 for one year at a time withdrew the termination order and continued her in service. Respondent Nos.2 and 3 have stated in an affidavit filed in reply to the petition that initially the post was advertised for a reserved category candidate due to inadvertence although the post was available to an open category candidate.

4. The petitioner contends that she was entitled to the post occupied by Respondent No.1. She belongs to the backward class. She contends that she is entitled

to be transferred to the junior college under Rule 41 of the MEPS Rules. She further submits that the appointment of Respondent No.1 is itself illegal and it was she who should have been appointed to the post if no candidate from the reserved category i.e. scheduled tribes was available in view of Rule 9 of the MEPS Rules. It appears that the petitioner had filed Writ Petition No.1506 of 1996 contending that she should have been appointed to the post in which Respondent No.1 had been appointed. The Division Bench of this Court on 11.3.1996 rejected the petition and directed the petitioner to pursue other remedies since she was already impleaded as a respondent in the appeal filed by Respondent No.1 before the School Tribunal.

5. The petitioner admittedly has not filed any independent proceedings, besides the aforesaid writ petition, to redress her grievance. When the vacancy arose in 1990, the petitioner did not at that stage contend that there was no need to advertise the post since she was teaching in the secondary school and she should be appointed to the Junior College. She has not challenged the appointment of Thosar to the post. Admittedly, Thosar was not a backward class candidate. It is obvious that the vacancy which arose on Mrs.Rane’s superannuation was for an open category candidate. It was only because for one year the School advertised the

post as being available for a reserved category candidate that the petitioner had filed the earlier writ petition in 1996 i.e., after Respondent No.1 continued in the school from 1991 onwards. Admittedly, the post was advertised each year from 1991 to 1996. A representation was made by the petitioner in 1993 to the school, the Education officer and other authorities to be transferred to the junior college. Although Respondent No.1 was continued in the post due to interim orders of the School Tribunal, the petitioner did not challenge those interim orders nor did she file any independent proceedings in the School Tribunal to contend that the appointment of Respondent No.1 was illegal. The dispute in the appeal before the School Tribunal fell within a narrow compass; whether the orders dated 26.10.1993 and 28.9.1995 terminating the services of Respondent NO.1 were legal and proper. It was, therefore, necessary for the petitioner to file independent proceedings to challenge the appointment of Respondent No.1. Not having done so, the petitioner cannot claim any relief in this petition.

6. It appears that the main contention of the petitioner is that there is a Government resolution dated 20.4.1980 which approves of transfers of assistant teachers from the secondary school to the junior colleges, depending on their eligibility and seniority.

The resolution has been set aside by the Nagpur Bench of this Court in its judgment in **Writ petition No.1524 of 1996** in the case of *Chandrakant Shende v/s. Deputy Director and others.* It was held that all appointments in private schools must be made in accordance with Rule 9(2), (3) and (4) of MEPS Rules. It appears that thereafter another Government Resolution was issued on 27.7.1999 which makes it clear that the petitioner has no right to be appointed to the junior college.

7. The entire argument of the learned advocate appearing for the petitioner is that although the resolution has been set aside in the aforesaid writ petition, the petitioner is still entitled to relief in the petition in view of Rule 41. He submits that under Rule 41, transfers are permitted of employees from one school to another on administrative grounds or at the request of an employee if it is administratively convenient. In my opinion, Rule 41 has no application in the present case at all. Rule 41 is available for transfers to be effected from one school to another without affecting the payscales. A transfer under Rule 41 would be available on an application made by the employee only if it was administratively convenient for the management. "Administrative convenience" would also include within its ambit the issue whether the candidate was suitable for the post to which she sought a

transfer. There is no material on record to indicate that despite it being administratively convenient the management has refused to accede to the request made by the petitioner for a transfer to the junior college. Rule 41(5) stipulates that a teacher should not be transferred to the Junior College from the secondary school against her will. However, this does not mean that she would be entitled to be transferred to the Junior College when a vacancy arises, as a matter of right.

8. The next submission is that the appointment of Respondent No.1 was contrary to the provisions of Rule 9 since she did not belong to the reserved category. However, this submission cannot be countenanced as there is no material on record to indicate that the post which fell vacant on the superannuation of Mrs.Rane was a reserved post. The learned advocate relies on a statement in the affidavit filed by the Deputy Director of Education wherein he has stated that although Respondent Nos.2 and 3 have appointed Respondent No.1, the education department had granted approval in accordance with Rule 9 only for a temporary period and had thereafter refused the approval for the year 1993-94. It is averred in this affidavit that the post which fell vacant was not for the open category but for the reserved Scheduled Tribe. There is no material on

record at all to justify this contention. The learned advocate for the petitioner contends that the very fact that approval has not been accorded indicates that the appointment of Respondent No.1 has not been made in accordance with law. It is now well settled that the approval which is accorded by the Education department for appointment to a post is only for the purposes of receiving grant from the Government for payment of salary. The employee’s services cannot be terminated on the ground that approval has not been accorded. Assuming Respondent No.1 was not appointed in accordance with law, the petitioner would not be entitled to be appointed in her place, ipso facto.

9. In view of this, Petition dismissed. Rule discharged. No order as to costs.